IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

NO. 77-1163
E. RICHARD FRIEDMAN, O.D., et al
Appellants

V.

N. J. ROGERS, O.D., et al
Appellees

NO. 77-1164
N. J. ROGERS, O.D., et al
Appellants

V.

E. RICHARD FRIEDMAN, O.D., et al
Appellees

NO. 77-1186
TEXAS OPTOMETRIC ASSOCIATION, INC., et al
Appellants

V.

N. J. ROGERS, O.D., et al
Appellees

Consolidated Appeals From
The United States District Court
For the Eastern District of Texas
Beaumont Division

BRIEF OF APPELLANT, TEXAS OPTOMETRIC ASSOCIATION, INC., IN SUPPORT OF THE CONSTITUTIONALITY OF THE TEXAS OPTOMETRY ASSUMED NAME STATUTE

LARRY NIEMANN
FRED NIEMANN, JR.
Niemann & Niemann
1210 American Bank Tower
Austin, Texas 78701

Attorneys for Appellant,
Texas Optometric Association, Inc.

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Opinion Below

The opinion of the District Court for the Eastern District of Texas, Beaumont Division, entered on September 12, 1977, is reported at 438 F. Supp. 428. A copy of that opinion may be found in the Jurisdictional Statement filed by the Attorney General of Texas.

Jurisdiction

This suit was brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331, 1343, 2201, 2281, and 2284 in the United States District Court for the Eastern Division of Texas, to enjoin as unconstitutional the enforcement of Sections 2.02, 5.09(a), 5.13(d) and 5.15(e) of the Texas Optometry Act. A three-judge district court was convened to hear this cause as was then required by 28 U.S.C. §2281 and 2284. The final judgment of the court was entered on October 27, 1977, declaring a portion of §5.09(a) and §5.13(d) unconstitutional, and declaring §2.02 and 5.15(e) constitutional. Notice of appeal was filed in the court below by the Texas Optometric Association, Inc. on December 22, 1977, by the State of Texas on December 20, 1977, and by Dr. Rogers, et al, on December 21, 1977. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253 and §2101(b). This Court noted probable jurisdiction in this case and consolidated the three separate appeals on April 17, 1978.

Question Presented

Whether a state statute prohibiting the practice of optometry under an assumed name is unconstitutional as an unwarranted infringement of First Amendment Freedom of Speech.

Statute Involved

The portion of Section 5.13 (d) of the Texas Optometry Act that the District Court held unconstitutional reads as follows:

> "No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas. . . ."

Statement of the Case

In 1959 the Texas State Board of Examiners in Optometry adopted what was known as "The Professional Responsibility Rule." This rule provided, in part, that the practice of optometry under an assumed name was prohibited. In 1969, the Texas Legislature enacted the comprehensive Texas Optometry Act (Art. 4552, Texas Revised Civil Stat. Ann.) which codified into statute what had previously been the Optometry Board's Professional Responsibility Rule. Section 5.13(d) of the Act prohibits optometrists from practicing under an assumed name, corporate name, trade name, or any other name other than the name under which he is licensed to practice optometry in Texas.

On August 25, 1975, the Appellant, Dr. Rogers, who is a member of the Texas Optometry Board, brought this case against the remaining five members of the Texas Optometry Board. In his suit, Dr. Rogers challenged Section 5.13(d) (the prohibition of assumed name practice), Section 5.09(a) (prohibition of price advertising by optometrists), Section 2.02 (makeup of the Optometry Board) and various other sections of the Texas Optometry Act as being unconstitutional, and he sought to enjoin their enforcement. Section 5.13(d), which is the statute at issue in this appeal, was challenged as being an infringement upon Dr. Rogers' first amendment

rights to commercial free speech. A three judge court was convened to consider the case.

On June 11, 1976, W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas, Chapter intervened and asserted that Section 5.13(d) violated Senior Citizens' first amendment rights. Mr. Dickinson and his associates will hereinafter be referred to as "Senior Citizens."

On September 13, 1976, the Texas Optometric Association, Inc., intervened in support of the Texas Optometry Board members and supported the constitutionality of Section 5.13(d), Section 2.02, and the other challenged provisions of the Texas Optometry Act.

On October 27, 1977, the three-judge court below entered its final judgment, ruling that §5.09(a) (the prohibition of price advertising) and §5.13(d) (the assumed name ban) were unconstitutional under the First Amendment, and that §2.02 (the board make-up provision) was constitutional. Neither party has chosen to appeal the lower court's ruling concerning price advertising. However, Dr. Rogers and Senior Citizens have appealed the lower court's ruling that §2.02 (board make-up) was constitutional. The Texas Optometric Association, Inc., and the members of the Texas Optometric Board have appealed the lower court's decision that §5.13(d) (the assumed name prohibition) is unconstitutional.

Summary of Argument

Section 5.13(d) of the Texas Optometry Act prohibits optometrists from practicing under an assumed name. It requires that an optometrist practice under the name in which he has been licensed with the Texas Optometry Board. The court below incorrectly determined that this

statute was unconstitutional as an infringement upon commerical free speech under the First Amendment.

This case differs from previous commercial speech balancing test cases in several significant ways. First, under current Texas law, optometrists may freely advertise. Section 5.13(d) does not affect an optometrist's right to advertise information as to price, availability of service, quality of service, or any other valuable commercial message. Secondly, Section 5.13(d) prohibits the use of assumed names, a form of commercial speech which is inherently misleading to one degree or another. Previous commercial speech cases have indicated that false or deceptive speech is not protected by the First Amendment. If the speech regulated by Section 5.13(d) is not protected by the First Amendment, then there is no need to go further and apply a balancing test analysis.

However, if a balancing test analysis is appropriate, Section 5.13(d) is constitutional under such an analysis. Under the First Amendment balancing test, the State's interests in enacting a commercial speech regulation are balanced with various First Amendment interests.

State Interests

The State has several interests in enacting Section 5.13(d):

(1) *Response to past abuse.* At one time optometrists were permitted to practice under trade names and assumed names; and during that time abuses were rampant. The Texas Legislature, viewing these abuses and hoping to protect the public from them, enacted Section 5.13(d).

(2) *Fixing professional responsibility*. By requiring an optometrist to practice under his own name, the State is better enabling the public to determine who is professionally responsible for the vision care services rendered. The State is attempting to insure that the identity of the individual optometrist is known upfront so that he will be more fully accountable to the patient.

(3) *Prevention of abandonment of bad reputation*. Since assumed names may easily be changed, an assumed-name optometrist who has developed a reputation for incompetence may easily abandon that bad reputation by assuming a new assumed name. Once he takes a new assumed name, none but the very sophisticated consumer will be aware that his practice is in fact the same practice that earned the bad reputation. And once the reputation for incompetence resurfaces, it can be abandoned again by assuming yet another name. The State has an interest in insuring that an optometrist practice only under the name in which he is licensed so that an optometrist may not change his trade name to abandon a previous reputation.

(4) *Enhancing the doctor-patient relationship*. Experience has shown that under an assumed name practice, patients often never learn the identity of the attending optometrist. This anonymity of the doctor discourages a close personal doctor-patient relationship and discourages a continuing professional relationship between doctor and patient.

(5) *Enhancing the likelihood of quality vision care*. Accountability tends to breed quality, while anonymity and lack of accountability tend to breed indifference.

Section 5.13(d) places the emphasis on the optometrist's personal accountability and responsibility for a patient's vision care. It places an emphasis on the doctor as an individual who is personally responsible, rather than on his role as an employee or associate of an anonymous and impersonal trade name organization. Furthermore it makes the doctor more accountable by emphasizing the permanent effect which incompetent work is likely to have on his personal, permanent reputation. The visibility and accountability increase the likelihood that the doctor will do his best in attending a patient. The increased accountability and the humanized doctor-patient relationship naturally increase the likelihood that quality vision care will be provided.

(6) *Increased public access to valuable consumer information*. When an optometrist practices under his own name, the public is immediately informed of the identity of the responsible optometrist, the name under which he is licensed with the State of Texas, and the name under which that optometrist's personal reputation is associated. None of this information is conveyed by an assumed name. Furthermore the consumer is made aware of this information automatically, without the necessity of making the effort to pierce a trade name veil of identity. Also, this information is made available to the patient at the beginning of the patient's quest for vision care, at the very time such information is most valuable to the "comparison shopper" patient. Section 5.13(d) serves the interests of the State by insuring the public early and easy access to valuable consumer information.

First Amendment Interests

Under the balancing test the State interests are balanced with the various First Amendment interests. These First Amendment interests are (1) the seller's interest in disseminating commercial information, (2) the consumer's interest in receiving valuable commercial information, and (3) society's interest in a free flow of commercial information. Unlike many of the commercial speech cases previously heard by this Court, the statute in question in this case does not significantly impair any of these interests. In fact, the interests are actually enhanced by Section 5.13(d).

(1) *The Seller's interest in disseminating commercial information.* The seller's interest in disseminating commercial information is not impaired by Section 5.13(d). No commercial message is stifled since there is no information conveyed by an assumed name which may not otherwise be conveyed by his true name or by advertising. No media is stifled since Section 5.13(d) does not affect the ability of an optometrist who practices under his own name from conveying commercial information via newspapers, television, or whatever other media he wishes. At most, Section 5.13(d) restricts the form of wording a message may take, insuring that it is more informative and less misleading.

(2) *The consumer's interest in receiving valuable commercial information.* Section 5.13(d) actually insures that more information is provided to the public. More information as to personal reputation, identity, accountability and licensing are conveyed by the true name of an optometrist. This valuable information is not conveyed

by an assumed name. The requirement that an optometrist not use a fictitious or assumed name does not deprive the consumer of any valuable information. Also, such information is provided to the consumer without further effort on the part of the consumer and is provided early, at a time when such information is most valuable.

(3) *Society's interest in a free flow of commercial information.* Again, Section 5.13(d) does not prevent any valuable information from being exchanged. Instead it increases the flow by requiring more information to be disclosed than might otherwise be disseminated. It insures that such information is made more available at the very initial stages of a search for vision care. Consequently, Section 5.13(d) actually enhances the free flow of commercial information.

On balance, Section 5.13(d) promotes several valuable State interests, yet does not significantly impair traditional First Amendment commercial free speech interests. In fact, the First Amendment interests are enhanced by Section 5.13(d). The State interests and First Amendment interests overwhelmingly tilt the balance in favor of the constitutionality of Section 5.13(d).

Although the concept of "freedom of commercial speech" is just now emerging, this Court has made it clear that commercial speech is not afforded the same degree of protection as non-commercial speech. Because of the peculiar hardiness of commercial speech, regulations to insure truthfulness, to prevent deception, and to better inform the public will be permitted in the commercial speech area. Section 5.13(d) is designed to protect and better inform the public. As such, it is constitutional.

Argument

Introduction

Section 5.13(d) of the Texas Optometry Act provides: "No optometrist shall practice . . . optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas . . ." Art. 4552, Tex.Civ. Stat.Ann.

The court below held that §5.13(d) is unconstitutional under the First Amendment of the United States, relying extensively on *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) [hereinafter called *Bates*] and *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 (1976) [hereinafter called *Virginia Pharmacy*].

The lower court reasoned that the *Bates* and *Virginia Pharmacy* advertising cases had strengthened the concept of commercial free speech to the point that they were controlling on the issue of the constitutionality of §5.13(d). Although the court recognized that the First Amendment balancing test should be applied to §5.13(d), the court did not seriously analyze the state's interests or the various First Amendment interests involved in §5.13(d). Instead, the court seemed to defer to the advertising cases as being determinative of the outcome of the balancing test in this case.

The lower court incorrectly interpreted *Bates* and *Virginia Pharmacy*. Although these cases do provide a framework for analysis of the constitutionality of §5.13(d), they are not directly controlling. When the

balancing test of *Bates* and *Virginia Pharmacy* is properly applied to §5.13(d), it becomes clear that §5.13(d) validly promotes valuable state interests with a minimum of infringement of First Amendment interests. In fact, certain First Amendment interests such as the consumers interest in receiving valuable information, and society's interest in a free flow of commercial information, are actually enhanced by §5.13(d). Section 5.13(d) is therefore constitutional under the First Amendment balancing test.

I. THIS CASE DOES NOT RAISE THE FIRST AMENDMENT QUESTIONS RAISED IN THE *BATES* AND *VIRGINIA PHARMACY* CASES.

Although the court below relied heavily on *Bates* and *Virginia Pharmacy* in determining that Section 5.13(d) was unconstitutional, Section 5.13(d) raises substantially different questions than were raised under either *Bates* or *Virginia Pharmacy*. Those cases dealt with statutes which prohibited truthful, non-misleading information from being communicated via advertising. Section 5.13(d) differs from the statutes in *Bates* and *Virginia Pharmacy* in that (1) it does not prohibit or even regulate advertising in any way, and (2) it prevents the use of fictitious or assumed names which the legislature was justified in considering as false and misleading.

A. *This is not an advertising case.*

Section 5.13(d) of the Texas Optometry Act prohibits optometrists from practicing optometry under a fictitious or assumed name. It requires that an optometrist practice under the name in "which he is licensed to practice optometry in Texas." Section 5.13(d) does not speak to whether an optometrist may advertise; and any effect §5.13(d) might have on advertising is purely incidental.

Under Texas law an optometrist may advertise. The primary restrictions on advertising by optometrists were those of §5.09 of the optometry act, which prohibited price advertising and which prohibited fraudulent, deceitful or misleading advertising. In the court below, that portion of §5.09 which prohibited price advertising was declared unconstitutional. No appeal has been taken on that matter and the constitutionality of §5.09 is not now before this Court. *As the law now stands, an optometrist may advertise the availability of his services, the price of his services, and the quality of his services, so long as such advertising is not misleading.* Therefore, this case does not present the question of whether the state may prohibit advertising by optometrists.

Similarly, this case does not raise the question of whether the State may prohibit advertising of assumed names used by optometrists. If this Court holds §5.13(d) is unconstitutional, then optometrists may use assumed names and may advertise using those names. If §5.13(d) is upheld, then optometrists must practice in their own name, and it would be illegal for them to practice under an assumed name. The only effect on advertising would be the incidental inability to advertise an illegal activity. As this Court has recognized before, where an activity is itself prohibited, no First Amendment question is raised by the incidental restriction on advertising of that activity. *Pittsburg Press Co. v. Pittsburg Commission on Human Relations,* 413 U.S. 376, 389 (1973). *Bates* at 384.

B. *Section 5.13(d) prohibits the use of assumed or fictitious names, which are by definition misleading.*

Unlike Bates and *Virginia Pharmacy,* this case deals with regulation of a type of commercial speech which is

by definition false and misleading. Whereas, *Bates* and *Virginia Pharmacy* dealt with statutes which prohibited the dissemination of truthful and non-misleading information, §5.13(d) deals only with the use of assumed names which are intended to mask the true identity of a practicing optometrist.

C. *Unlike Bates, the commercial speech regulated by §5.13(d) is not protected by the First Amendment.*

In Bates, Virginia Pharmacy, and *Bigelow v. Virginia,* 421 U.S. 809 (1975), [hereinafter called *Bigelow*], this Court has recognized that some First Amendment protections are to be afforded to commercial speech. In *Bates,* this Court held that the First Amendment does prohibit unwarranted restrictions of truthful, nondeceptive commercial speech. But, the exact extent to which false or misleading commercial speech is protected by the First Amendment has not yet been decided. This Court noted in *Virginia Pharmacy* that "untruthful speech, commercial or otherwise, has never been protected for its own sake". *Virginia Pharmacy* at 771. And "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena". *Bates* at 383. In the light of these pronouncements by this Court, commercial speech which is false or deceptive is not strictly protected by the First Amendment.

Once commercial speech is determined to be false or misleading, it no longer enjoys the protections afforded by the First Amendment and the Court need not invoke a lengthy and complicated balancing test analysis to determine if a regulation is permissible.

In the case at bar, the speech being regulated is speech which is by definition fictitious and which masks an optometrist's true identity. The use of a fictitious or assumed name is not protected by the First Amendment since such use is to one degree or another misleading. It is enough to determine that the speech regulated by §5.13(d) is inherently false or misleading and therefore not entitled to First Amendment protection.

In summary, *Bates* and *Virginia Pharmacy* are not controlling in the case at bar. This case does not involve advertising. It does not prohibit the dissemination of truthful or non-misleading information; and, unlike *Bates* and *Virginia Pharmacy,* it involves the regulation of speech which is inherently deceptive to some degree and is therefore not afforded First Amendment protection.

II. IF THE FIRST AMENDMENT DOES APPLY, SECTION 5.13(d) IS CONSTITUTIONAL UNDER THE BALANCING TEST.

If this Court concludes that the First Amendment threshold has been reached and that the balancing test rationale must be applied, we submit that the test has been met in our case.

In *Bates* and *Virginia Pharmacy*, this Court balanced the free speech interests of individuals and society with the various interests of the state in enacting the regulations. After balancing these various interests, this Court determined that the regulations in question were unconstitutional. Assuming that this same balancing test is to be applied to restrictions on false or misleading speech,

then §5.13(d) of the Texas Optometry Act must be analyzed in the light of the various interests which are enhanced or impeded by that regulation. Under such a First Amendment balancing test analysis, §5.13(d) is clearly constitutional.

A. *Important state interests are promoted by §5.13(d).*

In analyzing §5.13(d) under a balancing test analysis, it is necessary to first look at the various state interests and purposes served by that regulation. The starting point for the analysis is the stated purpose behind the statute. The statute provides:

> "The provisions of this section are adopted in order to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship." §5.13(a)

The language of the statute spells out the public interests which are sought to be protected: (1) Protection of the public from abuses that had occurred in optometry, (2) enabling the public to fix professional responsibility on a human being whose name is known, rather than on an anonymous assumed name, and (3) enhancing the doctor-patient relationship and thereby increasing the likelihood of better vision care. Furthermore, as a part of each of these purposes, there was the transcendant intent to insure that when information is disseminated to the public, it must be more truthful, more valuable, and less deceptive than in the past.

These various purposes behind §5.13(d) were analyzed extenstively by the Texas Supreme Court in *Texas State*

Board of Examiners in Optometry v. Carp 412 S.W.2d 307 (Tex. 1967), *cert. denied*, 389 U.S. 52 (1967) [hereinafter referred to as *Carp*]. In *Carp*, the Texas Supreme Court analyzed the purposes behind the professional responsibility rule of the Texas Optometry Board which was later enacted into law as §5.13 of the Optometry Act. Although *Carp* did not deal with any federal constitutional questions, the conclusions reached by the Texas Supreme Court shed a great deal of light on the purposes behind §5.13(d) and on the abuses that prompted its adoption. The *Carp* case will be referred to throughout Appellant TOA's analysis of the purposes behind §5.13(d).

1. *The State has an interest in protecting the public from the assumed name abuses which at one time plagued the profession of optometry in Texas.*

Prior to the enactment of §5.13(d) and its predecessor (the professional responsibility rule), optometry in Texas was plagued by a history of trade name abuse. One of the primary purposes of the enactment of §5.13(d) was to protect the public from the abuses that had previously occurred. In *Carp*, the Texas Supreme Court cited several examples of abuses which had characterized optometry in Texas.

The court noted that some optometrists were operating offices under fictitious names, using the assumed names to mislead and take advantage of the public.

> "Dr. Carp operates 71 offices in Texas. He advertises them under the following trade names: Luck Optical, Luck One Price Optical, Mast Optical, Mesa Optical, Mack Optical,

Plains Optical, Amarillo Optical, Lubbock Optical, Panhandle Optical and Mission Optical. From time to time he adds, drops, or changes the trade name at a particular office although the licensed optometrists employed in that office remain the same . . .

"Illustrative of Dr. Carp's trade or assumed name practices is the situation that exists in Wichita Falls. Within a two block area in that city, Dr. Carp maintains offices operated under the names of Mast Optical, Luck Optical, and Lee Optical. The supervisor oversees these three offices. Each office dispenses the same optical goods and services and uses the same kind of equipment. Optometrists are shifted from one location to the other. Dr. Carp's advertising represents to the public that these three offices are in competition with each other thereby creating the false impression that they are each independently owned and operated. Similar situations exist in Dallas and El Paso." *Carp* at 311-312.

By using various assumed names, some optometrists were misleading the public as to the ownership and degree of competition present in various optometry practices. Another frequent abuse resulted from one optometrist assuming the name of another licensed optometrist. As the Texas Supreme Court recognized:

> "He [Dr. Carp] has purchased the practices of licensed optometrists and practices under their name although they are no longer associated with the respective offices in any manner. . . .

> "Dr. Carp has advertised and practiced under the names of Douglas Optical, Shannon Optical, Pearl Optical, Lee Optical, Lee Optical Company and Dr. L.H. Luck. Those are the names of licensed optometrists who sold Dr. Carp their locations and the use of their names, but continued their practice independently of Dr. Carp." *Carp* at 311-313.

Prior to the enactment of the Professional Responsibility Rule in Texas, one licensed optometrist would freely practice under the name of another licensed optometrist, even though the latter optometrist was no longer associated with the business in any way. In fact, that latter optometrist might elsewhere be engaging in a completely independent practice of his own. Abuses such as these prompted the legislature to require that an optometrist practice under the name in which he was licensed.

In enacting §5.13(d), the legislature was responding to the peculiar history of optometry in Texas. Assumed name abuse and other misrepresentations associated with assumed name practices were widespread in Texas. Among those contributing to the abuse was the Appellee herein, Dr. Rogers. The Texas Supreme Court specifically addressed the manner of practice of Dr. Roger's, noting:

> "Texas State Optical's advertising leaves the impression that one of the Doctor Rogers is present at a particular office. Actually they have neither been inside nor seen some of their 82 offices distributed generally over Texas. They list their names in phone books and cities where

> they do not purport to practice optometry and on plaques showing the names of the optometrists who serve particular offices though they do not in fact practice at such offices. Such practices are deceptive and misleading." *Carp* at 313.

The history of actual abuse that existed in Texas prior to the enactment of the Professional Responsibility Rules, prompted the Texas Optometry Board . . . and later the legislature . . . to enact strict professional responsibility rules. Because of optometry's particular history of assumed name abuse which included deception as to the degree of competition and deception as to identity of the practicing optometrist, the legislature was justified in requiring optometrists to practice under the name in which they are licensed.

2. *The State has an interest in enabling the public to fix professional responsibility.*

Section 5.13(d) requires that an optometrist practice under his own name, and not hide behind the anonymity of an assumed name. When an optometrist practices under his own name, the patient knows immediately who the responsible optometrist is. He is more likely to know what individual or individuals he will be dealing with, and who will be most immediately responsible if errors are made. Similarly, he knows that the optometrist has a personal reputation to maintain, and therefore has a greater personal interest in insuring that he does his job correctly.

> "The reason for this section is that the trade or assumed name practice, like fee-splitting,

disrupts the optometrist-patient relationship by concealing the identity and burying the responsibility of the licensed optometrist." *Carp* at 311.

When a patient goes to an optometrist practicing under his own name, the name in which he was licensed, the patient knows upfront who the responsible optometrist will be, and he knows in advance the name under which the optometrist is licensed with the Texas Optometry Board. If optometrists are permitted to practice under fictitious or assumed names, then the patients will not be aware of the name in which the optometrist is licensed.

> "The practice of optometry under a trade name is a holding out to the public that the trade name is licensed. *The result is that the identity of the licensed practicing optometrists is hidden behind the unlicensed trade name.*" Carp at 312, emphasis added.

Section 5.13(d) fixes professional responsibility, informing the consumer immediately of the identity of an individual optometrist who will be professionally responsible for the services rendered. The State has an interest in fixing such responsibility.

3. *The State has an interest in insuring that optometrists do not easily abandon a bad reputation.*

Closely related to the interest of assisting the public to fix professional responsibility, is the State's interest in insuring that an optometrist "own up" to his professional reputation. When an optometrist must practice in

the name in which he has been licensed, he will, over the course of his professional career, develop a reputation. The reputation may be one of excellence, or it may be one of incompetence and shoddy work. But, whether the reputation is good or bad, the reputation will follow the optometrist throughout his career, since, wherever he practices, he must practice under the name in which he has been licensed.

However, if optometrists are freely permitted to practice under a fictitious or assumed name, an optometrist may easily rid himself of a bad reputation. When an optometrist's assumed name develops a bad reputation, the optometrist need only pick a new assumed name. He will automatically be able to start over with a clean slate. As was indicated earlier, the Texas Supreme Court expressly realized that such was happening in Texas before enactment of §5.13(d).

> "From time to time he [Dr. Carp] adds, drops, or changes the trade name at a particular office although the licensed optometrists employed at the office remain the same." *Carp* at 311.

The State has an interest in insuring that the bad reputation as well as the good reputation of an optometrist follows an optometrist throughout his career. Such reputations provide valuable commercial information to the consuming public. By requiring an optometrist to practice in his own name, it is more likely that the consuming public will be made aware of a particular optometrist's reputation for competence . . . or incompetence.

4. *The State has an interest in enhancing the doctor-patient relationship.*

The Section 5.13(d) requirement that an optometrist practice in his own name enhances the doctor-patient relationship. A doctor-patient relationship is naturally strengthened when the patient knows the identity of the optometrist attending him. Under an assumed name practice, there is no certainty that the patient will ever know the identity of the attending optometrist. In fact, experience has shown that there is a correlation between assumed name practice and minimal personal relationships between doctor and patient. Dr. Richard Shannon, former owner of an assumed name optometric chain in Texas, testified to that fact. His experience, prior to the requirement that optometrists practice under their own names, vividly confirms legislative fears about the deterioration of the doctor-patient relationship. Dr. Shannon's testimony was as follows:

Q. Was there a continuing personal relationship between the doctors of optometry and the patients at your local offices?

A. No. There was no— for the most part, there was no personal relationship. The patient was an individual that had a service performed by a doctor, and as soon as that patient got out the doctor's door, another one came in. For the most part, the doctor would not recall that patient unless it was a most unusual circumstance that went along with it.

Q. You are saying, then, that the examining doctor did not know the patients by name or remember them by name?

A. That's correct.

Q. How about vice versa?

A. I would say the same. In most cases the patients were not introduced to the doctor in our offices. The patient would be told by one of the girls or one of the clerks in the office, "The doctor is ready for you. Come with me.", and she in turn would take him or her into the examining room and say, "Please be seated. The doctor will be with you in just a moment."

Q. In what percentage of the new patient cases would the patient previously know the doctor by some—

A. It would be very low.

* * *

A. The only time a doctor would know— or the patient would know the doctor, that I can recall, is when we employed a doctor who had been located in that particular locale, and we placed him into one of our offices located in that immediate area. This happened on very, very infrequent occasions." (Shannon Deposition, Appendix pp. 112-113).

Dr. Shannon's testimony confirms that in an assumed name practice the identity of the optometrist and the care of the patient is deemphasized. This de-humanization necessarily leads to a potential deterioration of the doctor-patient relationship. By requiring an optometrist to practice under his own name, the legislature had taken an important step to humanize and enhance the doctor-patient relationship.

Furthermore the legislature has made it easier for a patient to insure a *continuing* relationship with his doctor. If an optometrist is one of many optometrists practicing under a single assumed name, or if an optometrist is shuttled between various offices bearing one or more assumed names, or if the optometrist periodically changes the assumed name under which he practices, it becomes more difficult for a patient to return to the same optometrist who has previously examined him. Consequently, the patient may be less likely to develop a continuing relationship with a single optometrist. He is less able to return to the individual optometrist who is most familiar with that patient's optometric history.

Section 5.13(d) serves a legitimate state interest by insuring that a patient knows the identity of the optometrist, thereby enhancing a closer doctor-patient relationship and a continuity of vision care.

5. *The State has an interest in enhancing the likelihood of quality vision care.*

It is an axiom of human nature that accountability tends to breed quality while anonymity and lack of accountability tend to breed indifference. Section 5.13(d) puts accountability of the optometrist in the forefront and thereby increases the likelihood that the optometrist will render the highest quality of vision care.

Section 5.13(d) requires that the responsible optometrist inform his patient of his true identity from the very outset of their professional relationship. This establishes in the mind of the patient and the optometrist that the doctor himself — not just some anonymous assumed

name company— is personally and professionally responsible for the vision care provided. This emphasis on upfront accountability naturally increases the likelihood of quality vision care.

As discussed previously, in an assumed name practice, the identity and reputation of the individual optometrist is deemphasized and the doctor-patient relationship suffers. The relative anonymity and the decreased emphasis on personal accountability inherent in a trade name practice logically tends to cause the optometrist to feel less responsible for his patients and less fearful of repercussions from the patients' dissatisfaction or from the doctor's poor quality of service. Such an optometrist who practices under an assumed name can afford to be less concerned about his long term reputation since he may effectively abandon a bad reputation by taking a different assumed name. The increased likelihood of indifference that is engendered by an assumed name practice, results in a corresponding likelihood that quality of vision care will decline.

Section 5.13(d), therefore, enhances the likelihood of quality care by placing an emphasis on identity, personal accountability, a strengthened doctor-patient relationship, and the optometrist's knowledge that his personal reputation is permanently at stake. These will naturally increase the likelihood that the optometrist will render higher quality vision care.

6. *The State has an interest in insuring that the public has easier access to information which is more truthful and more valuable than might otherwise be be available.*

By requiring an optometrist to practice in the name in which he has been licensed, the state is requiring that the optometrist convey more information to the consumer than might otherwise be conveyed. The public is automatically made aware of the identity of the responsible optometrist. The public is made aware of the name under which that optometrist is licensed with the State. And the public is given access to the complete reputation of the responsible optometrist, not just that portion of his reputation which is associated with one particular assumed name. Such information is not conveyed by a fictitious or assumed name.

Furthermore, the State is requiring that this information be made available upfront while the consumer still has the opportunity to make a free choice among optometrists.

These state interests would not be fully served by merely requiring an optometrist to hang a license or diploma in his examining room or in his lobby. By the time the patient reaches that point on his quest for vision care, the patient is already in the grasp of the optometrist and has made the irrevocable decision to utilize the services of such optometrist. The state has a valid interest in insuring that the responsible optometrist's name is known upfront before the patient enters the optometrist's office and early enough to enable the patient to compare and check out reputation.

In summary, the state has valid interests in prohibiting an optometrist from practicing under an assumed name. Section 5.13(d) protects the public from the abuses that were rampant in Texas optometry prior to its enactment. It better enables the public to fix professional responsibility, and it enhances the doctor-patient relationship. It increases the likelihood of quality eye care and it provides the public more truthful and more valuable information than might otherwise be available.

B. *Important First Amendment interests are promoted by §5.13(d).*

After analyzing the state interests served by particular regulations of commercial speech, the balancing test next dictates that those state interests be balanced with First Amendment interests. Those First Amendment interests have generally been defined by this Court as: (1) the seller's interest in the dissemination of information, (2) the consumer's interest in receiving valuable commercial information, and (3) society's interest in the free flow of commercial information. In both *Bates* and *Virginia Pharmacy,* the regulations in question imparied each of these First Amendment interests. However, in the case at bar, these First Amendment interests are actually enhanced by §5.13(d), rather than impaired. Therefore, in this case these First Amendment interests speak in favor of §5.13(d), rather than against the regulation as they did in *Bates* and *Virginia Pharmacy*.

1. *The seller's interest in disseminating information is not impaired by §5.13(d).*

In *Bates* and *Virginia Pharmacy* this Court has noted that in the commercial arena the seller has an interest in

disseminating certain information— in getting certain messages across to the public. This interest is not significantly imparied by §5.13(d). The requirement that an optometrist practice under the name in which he is licensed does not prevent an optometrist from disseminating any particular message, and it does not prevent an optometrist from using any particular media for communicating that message. At most, §5.13(d) imposes minimal restrictions on the form of a commercial communication, requiring that it be in such a form as to be less deceptive.

a. *No message is stifled.* Section 5.13(d) does not speak to whether an optometrist may communicate information as to the availability of his services, the price of his services, the quality of his services, or any other commercial information. Whether or not an optometrist is required to practice exclusively under his own name has absolutely no bearing upon his ability to communicate such commercial information. There is no message which is conveyed by the use of a fictitious name which cannot be communicated by an optometrist using the name in which he is licensed.[1]

Section 5.13(d) does not prevent the communication of any particular message to the public. This was not the case in *Virginia Pharmacy* where a statute suppressed the message of the price of pharmaceutical products. This

[1]Dr. Rogers has argued that a name implicitly conveys certain information regarding the reputation associated with that name. If that is the case, then *all* names, whether assumed or real, "convey" such a message. Whether an optometrist practices under his own name or under his real name, a certain reputation will attach to that name and be "communicated" by it. Requiring an optometrist to practice under his own name does not restrict "communication" of reputation, since that message will be "conveyed" by the name under which he is licensed.

was not the case in *Bates* in which a statute prohibited an attorney from communicating the message of the availability of his services and the price of routine services to be offered. This was not the case in *Linmark, infra,* where a statute was found to restrict communication of a message that houses were for sale. Unlike these cases, §5.13(d) does not stifle any message that an optometrist might communicate to the public.

b. *No media is stifled.* Unlike *Linmark Associates Inc. v. Township of Willingboro* 431 U.S. 85 (1977) [hereinafter called *Linmark*], §5.13(d) does not restrict the use of any particular medium of communication. In *Linmark,* this Court struck down a statute which prohibited the use of "For Sale" signs in communicating a commercial message. In *Bates* and *Virginia Pharmacy,* the statutes prohibited advertising as a medium for communication of certain messages concerning price and availability of services. Unlike these cases, Section 5.13(d) does not stifle any particular medium of communication.[2] Section 5.13(d) does not speak to whether or not

[2] In his motion to affirm, Dr. Rogers alleges that §5.13(d) will increase the cost of advertising since each optometric office "must advertise separately rather than have a single trade name advertisement that benefits several offices." Page 56 of Rogers' Motion to Affirm. He argues that requiring an optometrist to practice under his own name lessens the availability of advertising as a media for communication. Dr. Rogers' reasoning here is faulty in the §5.13(d) does not prevent a group of optometrists from pooling together to reduce production costs of advertising. A single advertisement could easily convey the names and addresses of several optometrists within an area. The fact that the optometrists involved must be listed under their own names would not significantly affect the availability of advertising as a media of communication. As this Court noted in *Virginia Pharmacy* at page 773, "Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely."

optometrists may advertise. It does not speak to whether or not optometrists may communicate their commercial messages via television, radio, newspaper, signs, or other means of communication.

c. *At most, §5.13(d) imposes minimal restrictions on the wording or form of a message so as to make it less deceptive.* Section 5.13(d) requires that an optometrist practice under his own name, not under a fictitious or assumed name. At most this is only a restriction on the form or wording of the communication which informs the public of the identity of the optometrist. By requiring the optometrist to practice under his own name, the optometrist is merely being required to couch his communication in such form as to be less deceptive. Rather than communicate under a fictitious or assumed name which does not convey meaningful information to the public, the optometrist must communicate under his own name which immediately communicates his identity and the name in which he is licensed. As this Court noted in *Virginia Pharmacy* at page 772, the government may require that commercial speech appear in such a form, or include such additional information, warnings, or disclaimers as necessary to make it less deceptive.

Section 5.13(d) of the Texas Optometry Act at most affects the form of a message, requiring such form to be less deceptive. It does not restrict the content of the message nor does it restrict the media by which such a message may be conveyed. As such, Section 5.13(d) does not significantly affect, one way or another, a seller's interest in disseminating commercial information to the public.

2. *The consumer's interest in receiving valuable commercial information is enhanced by §5.13(d).*

The second of the First Amendment interests that must be balanced is the consumer's interest in receiving valuable commercial information. Section 5.13(d) does not impair this interest. In fact, it insures that *more* information will be available to the public, and that the information will be more easily accessible to the consumer and more readily available when the consumer most needs such information. Section 5.13(d) therefore enhances the consumer's interest in receiving commercial information.

a. *Section 5.13(d) does not deprive the consumer of any valuable information.* The statutes in *Bigelow, Virginia Pharmacy, Linmark,* and *Bates* either prohibited or severely restricted valuable commercial information from being disseminated. As such, these restrictions deprived consumers of valuable commercial information. In *Bigelow* the statute prohibited the advertising of availability of abortions, even though abortions were a legal activity. The prohibition deprived consumers of information concerning the availability of a lawful service. In *Virginia Pharmacy,* the statute prohibited the advertising of price information concerning pharmaceutical products. The statute deprived consumers of price information which is vital for the making of an intelligent commercial decision. In *Linmark,* the statute prohibited the placing of "For Sale" signs in the yards of houses. The Court determined that this prohibition had the effect of depriving the consumer of information as to the availability of houses for sale. In *Bates,* the statute prohibited attorneys from advertising the availability of services and prices. The statute was found to deprive the consuming

public of valuable information which was necessary to make an intelligent commercial decision.

Unlike the statutes in *Bigelow, Virginia Pharmacy, Linmark* and *Bates,* the statute in our case does not deprive the public of any valuable commercial information. It does not deprive the public of knowledge of availability of services, price of services, quality of services, or any other information which is necessary to make an intelligent commercial decision. The requirement that an optometrist refrain from using a fictitious name does not deprive consumers of any information which is necessary in making an intelligent commercial decision as to which optometrist to patronize. If anything, by requiring an optometrist to practice under his licensed name, the consumer is actually given more information than he would be given if the optometrist were free to practice under a fictitious name.

b. *Section 5.13(b) actually provides more information than might otherwise be available to the consumer.* The requirement that an optometrist practices under his licensed name rather than an assumed or fictitious name actually assures that *more* information will be conveyed to the consumer than might otherwise be the case.

When an optometrist is required to practice under his true name, that name immediately notifies the consumer of the identity of the responsible optometrist. However, if an optometrist is permitted to practice under an assumed or fictitious name, that information is not conveyed to the public. The true name of the optometrist conveys more information than an assumed name would.

When an optometrist is required to practice in his true name, the reputation of an entire career attaches to that name. However, if an optometrist practices under an assumed name, only the limited reputation associated with that assumed name is "conveyed" to the public. Consequently, the true name of the optometrist conveys more information to the public. The true name is more likely to convey the bad elements of a reputation as well as the good elements, since the bad elements will not be lost behind a succession of assumed names. Section 5.13(d) tends to convey more information as to bad reputation, and such information is certainly valuable to the consumer in deciding in whose hands his vision care will be placed.

When an optometrist practices under an assumed name, it is much more difficult for the consumer to obtain from his friends or acquaintances information concerning the reputation of a particular optometrist, and it is much more difficult for him to determine whether or not that optometrist is qualified or is licensed with the State.

c. *Section 5.13(d) provides easier and earlier access to valuable information.* When the true name of the optometrist must be used upfront, the consumers search for the true identity of the responsible optometrist involves less effort and less difficulty. In contrast, when an optometrist practices under an assumed name, the consumer must make a concerted effort to determine the identity of the responsible optometrist. Section 5.13(d), therefore, makes it easier for the patient to receive this valuable information.

Also, this information is gained earlier . . . at the initial stages of his search for an optometrist. This is exactly the

time in which such information is most valuable to comparison shopper consumers interested in quality eye care. If a patient knows the identity of the responsible optometrist up front, he may intelligently investigate an optometrist, determine his reputation, make inquiry among his friends regarding the optometrist's reputation, and generally compare him with other optometrists in the area. However, a patient's ability to conduct such comparisons is seriously impaired if the patient does not know the identity of the responsible optometrist until he has actually entered the office of that optometrist. Under an assumed name practice, a patient may not learn the identity of his optometrist until he is actually being examined. (In fact Dr. Shannon's testimony has indicated that many patients will not learn the identity of a doctor even at that stage. See *supra* at p. 22 and Shannon deposition, Appendix pp. 112-113). Section 5.13(d) insures that the consumer is *more easily* made aware of the identity of the responsible optometrist and that he is made aware *early enough* so that that information will be helpful in making an important decision regarding his eyesight and vision . . . a decision of a bit more importance than the purchase of a bag of beans or a box of cereal.

3. *Section 5.13(d) enhances society's interest in the free flow of commercial information.*

Unlike the statutes in the other balancing test cases, §5.13(d) does not impair the free flow of commercial information. If anything §5.13(d) requires that the commercial information be more truthful and more informative.

Section 5.13(d) requires an optometrist to use his true name, rather than a fictitious or assumed one. As such, §5.13(d) requires that truthful information be conveyed, rather than false information. This does not impair the free flow of commercial information. As this Court noted in *Virginia Pharmacy* at page 773, there is little likelihood that the free flow of commercial information will be "chilled" by proper regulation. This Court has repeatedly recognized that regulation to assure truthfulness will not discourage protected speech. *Bates* at 383. Since Section 5.13(d) does not prevent an optometrist from communicating valuable information over whatever media he wishes, and since §5.13(d) does not restrict valuable information, §5.13(d) has a minimal impact on the free flow of commercial information.

In fact, by requiring disclosure of the optometrist's true identity up front when it can be valuable in the decision making process, §5.13(d) actually increases the flow of information. By requiring the dissemination of information which might not otherwise be made available to the public, the flow of valuable information is increased. As this Court has noted, the government may require that commercial speech appear in such a form, or include such additional information, warnings, or disclaimers as are necessary to make it less deceptive. *Virginia Pharmacy* at 772. Although such regulations might theoretically have some effect on the free flow of commercial information, on balance, the effect is to *increase* the flow of information and to insure that the information which does flow is more accurate. "The First Amendment . . . does not prohibit the State from

insuring that the stream of commercial information flows cleanly as well as freely." *Virginia Pharmacy* at 771-772.

4. *Section 5.13(d) strikes a fair balance.*

After having reviewed the various State and First Amendment interests affected by §5.13(d), it is necessary to balance these different interests to determine whether or not the statute is an impermissible infringement upon First Amendment rights.

In *Bates* and *Virginia Pharmacy* the statutes under challenge were found to impair each of the First Amendment interests — the interest to the seller in disseminating information, the interest to the buyer in receiving valuable information, and the interest of society in a free flow of commercial information. Because the statutes in question impaired those interests, those First Amendment interests were balanced against the other interests offered by the State. In both *Bates* and *Virginia Pharmacy,* the interests offered by the State were not found to be sufficient enough to justify impairment of the First Amendment interests.

In applying the balancing test to §5.13(d), this Court is faced with a somewhat different balance. In contrast to *Bates* and *Virginia Pharmacy,* the First Amendment interests in our case are not impaired, but are actually enhanced by §5.13(d). Therefore, the First Amendment interests actually speak in favor of the constitutionality of §5.13(d).

Balanced on the one side *in favor* of §5.13(d) are the various State interests: the State's interest in protecting the public from the assumed name abuses which plagued Texas optometry prior to the enactment of the statute, the State's interests in enabling the public to fix professional responsibility, the State's interest in insuring that optometrists do not easily abandon a bad reputation, the State's interest in enhancing the doctor-patient relationship, the State's interst in enhancing the likelihood of quality vision care, and the State's interest in insuring the public has easier access to information which is more truthful and more valuable than that which might otherwise be available. Also on the side of the scale in *favor* of §5.13(d) are the various First Amendment interests. The buyer's interest in receiving *valuable* information is enhanced, not impaired by § 5.13(d). Society's interest in the *free flow* of commercial information is similarly enhanced, not impaired, and society's interest in a *clean* flow of commercial information is enhanced. Finally, the seller's interest in the dissemination of information is not impaired.

In sharp contrast to the many interests favoring the constitutionality of §5.13(d), is the fact that there are no significant interests which are impaired by §5.13(d). None of the First Amendment interests impaired by the statutes in *Bates* and *Virginia Pharmacy* are impaired here. There is no significant commercial message which is prevented from being disseminated. Unlike *Bates* and *Virginia*

Pharmacy, this statute insures that more information is communicated rather than less information.[3]

As a balance is struck between the various interests affected by §5.13(d), it becomes apparent that both the State interests and the First Amendment interests overwhelmingly tilt the scale in favor of §5.13(d). Under the First Amendment balancing test of *Bates* and *Virginia Pharmacy,* it is clear that §5.13(d) is valid and is not a significant infringement on First Amendment freedom of commercial speech.

III. THIS COURT HAS INDICATED THE NEED FOR AND THE VALIDITY OF REGULATIONS SUCH AS SECTION 5.13(d).

In this Court's decisions in *Bigelow*, *Virginia Pharmacy*, *Linmark*, and *Bates*, it has been made clear that

[3]Any harm alleged by Dr. Rogers must be compared and juxtaposed to the harm sought to be remedied by §5.13(d). The harms allegedly created by §5.13(d) must exceed and outweigh the benefits flowing to the public therefrom.

Assuming arguendo that Dr. Rogers is correct in arguing that the assumed name ban deprives the public of some commercial information, the balancing test is nonetheless satisfied. The legislature has made a studied decision that the disclosure of individual accountability is of greater public interest than the disclosure of assumed names. Moreoever, the Texas Supreme Court has specifically recognized the harms and abuses of the trade name practice of optometry in Texas. Lastly, these harms and abuses have been amply established by the evidence in our case. When so extensively justified by the legislature, the Texas courts, and the evidence in the record, TOA would respectfully submit that the legislature's judgment of the proper balance of the relative harms should not be usurped by this Court under the balancing test unless the legislature was clearly wrong.

commercial speech is subject to some degree of First Amendment protection. However, this Court has expressly recognized that commercial speech may be regulated more extensively than speech which does not convey a commercial message, and this Court has gone out of its way to point out that regulation of false or deceptive commercial speech is permissible. The exact extent to which commercial speech is protected by the First Amendment is uncertain since the concept of "freedom of commercial speech" is just now emerging. The outer limits of permissible regulation have not been clearly defined. However, this Court has noted several examples in which regulation is permissible.

As with non-commercial speech, reasonable restrictions may be placed on the time, place, or manner of commercial speech. *Bates* at 384. Furthermore, this Court has specifically noted that regulations which are impermissible for non-commercial speech may be permissible in the commercial arena since commercial speech is to be afforded less protection than non-commercial speech. *Virginia Pharmacy* at 771, note 24. For example, the doctrine of overbroadness does not apply to commercial speech as it does to non-commercial speech. *Bates* at 382. Similarly the prohibition against prior restraints may not apply to commercial speech. *Virginia Pharmacy* at 771, note 24. And, perhaps most significantly, this Court has noted that the *content* of commercial speech may determine the extent of its protection. *Young v. American Mini Theatres, Inc.* 425 U.S. 50, 68-69 (1976) [hereinafter called *Young*].

The Court has repeatedly recognized that commercial speech which is false, deceptive, or even merely misleading is subject to restraint. *Virginia Pharmacy* at 771, *Bates* at 383. And the Government's right to restrain misleading as well as false statements in labels and advertising has long been recognized. *Young* at 68. The Government may require that commercial speech appear in such a form, or include such additional information, warnings, or disclaimers as are necessary to make it less deceptive. *Virginia Pharmacy* at 772. And the Government may prohibit businessmen from making statements which, though literally true, are potentially deceptive. *Young* at 68.

In fact, commercial speech which is not even potentially misleading may, to a certain extent, be regulated on the basis of its content. As this Court recognized in *Young*, a state statute may permit highway billboards to advertise businesses located in the neighborhood, but not elsewhere. *Young* at 68, citing *Markham Advertising Company v. State*, 773 Wash.2nd 405, 39 P.2nd 248 (1968), (appeal dismissed for want of substantial Federal question, 393 U.S. 316.), and a public transit system which accepts some advertisting may refuse to accept advertisement with a political message. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

This Court has made it clear that commercial speech may be more extensively regulated than non-commercial speech. It has specifically recognized the right to regulate such speech to make it more truthful, more informational, and less deceptive. Section 5.13(d) is a regulation intended to enhance truthfulness by requiring the true name of an optometrist to be disclosed rather than a fictitious or assumed name. It enhances informational con-

tent by requiring that the identity of the optometrist be made known up front while the consumer still has the power to choose between various optometrists. By identifying up front who the responsible optometrist will be rather than requiring the consumer to penetrate layers of assumed names, §5.13(d) prevents the consumer from being mislead. Thus, §5.13(d) is a permissible regulation of commercial speech.

IV. SECTION 5.13(d) IS NOT UNCONSTITUTIONAL AS BEING OVERBROAD.

In his motion to affirm, Dr. Rogers has argued that §5.13(d) is unconstitutionally overbroad in that it prohibits optometrists from using any trade name, not just those which are deceptive. This argument is fallacious.

Fictitious or assumed names are by definition false, and they serve to mask the true identity of the optometrist using that false name. To one degree or another, such a false name is deceptive and misleading. The degree of harm resulting from such deception may vary from situation to situation, just as the harm resulting from any deceptive communication will vary depending upon the circumstances.

The Legislature has not acted overbroadly in enacting §5.13(d). Since *all* assumed names are to some extent false and misleading. §5.13(d) accomplishes exactly what it is intended to do without being overbroad. It singles out a specific type of communication that is by definition false and misleading. It prohibits that form, and only that form, of communication and does not inhibit the conveyance of any message or the use of any media.

Therefore, §5.13(d) is not overbroad. In any event, this Court has noted that the overbroadness doctrine does not apply to commercial speech. *Bates* at 382.

Furthermore, the assumed name of "Texas State Optical," under which Dr. Rogers seeks to practice optometry, itself contains all of the deceptions inherent in an assumed name. The term "Texas State Optical" masks the true name of the responsible optometrist, it does not convey any information as to licensure of the optometrist, and the name may easily be changed if it becomes associated with a poor reputation. The name "Texas State Optical" conveys no meaningful information about the optometrist. If anything, the name might mislead some customers to believe that "Texas State Optical" is somehow officially associated with the State of Texas, which, of course, it is not. Dr. Rogers may not challenge §5.13(d) as being overbroad since the assumed name he seeks to use for the practice of optometry evidences the very deceptions the legislature has attempted to prevent.[4]

In any event, §5.13(d) is not overbroad. It deals only with a limited type of "communication" — assumed names in the practice of optometry. As such it deals only with speech that is, by definition, untruthful and misleading to one degree or another.

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[4]It should be remembered that the Optometry Act fully allows Dr. Rogers' *opticianries* to use the assumed name of "Texas State Optical." There is no statutory prohibition against the use of assumed names in the merchandising business of selling frames and filling eyeglass prescriptions.

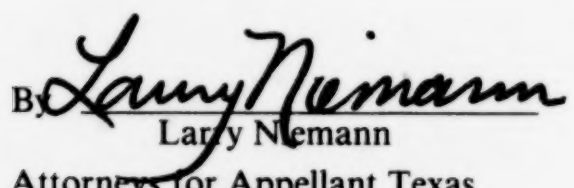
V. THE *BIGELOW* AND *BATES* CASES DID NOT IMPLICITLY RECOGNIZE A CONSTITUTIONAL RIGHT TO USE AN ASSUMED NAME.

Dr. Rogers argues in his motion to affirm that this Court implicitly recognized the constitutional right to use assumed names when it permitted advertising by the "Women's Center" in *Bigelow* and the "Legal Clinic of Bates and O'Steen" in *Bates*. See Rogers' motion to affirm pages 46 and 55-56. This argument is also fallacious. *Bigelow* addressed only the issue of whether or not a blanket prohibition of advertising of a legal activity is constitutional. That case had nothing to do with the right to use trade names and this Court did not address the question. In *Bates*, the Court found that the use of "Legal Clinic of Bates and O'Steen" was not deceptive. In that case the responsible attorneys, Bates and O'Steen, used their own name, they were not practicing under an assumed name. The term "Legal Clinic" was a generic description of their office much like "The Law Office of Bates and O'Steen" would be. Section 5.13(d) would not prohibit optometrists from practicing under the name "Optometry Office of Bates and O'Steen" or "Optometry Clinic of Bates and O'Steen," provided Bates and O'Steen were licensed optometrists practicing on the premises. In such a case they would be practicing under their own names. The *Bates* case did not address the question of whether a prohibition of the use of assumed names is constitutional. Therefore, neither *Bates* nor *Bigelow* "implicitly" recognize a constitutional right to use a fictitious name, and neither are controlling in the case at bar.

Conclusion

On the basis of the foregoing, the Texas Optometric Association respectfully urges that Article 4552, Section 5.13(d), which prohibits an optometrist from practicing under or using an assumed name, is constitutional under the First Amendment. The Texas Optometric Association prays that the judgment of the three-judge district court be reversed in part and rendered on the issue of the constitutionality of Section 5.13(d).

Respectfully submitted,
Larry Niemann
Fred Niemann, Jr.
NIEMANN & NIEMANN
1210 American Bank Tower
Austin, Texas 78701
512/474-6901

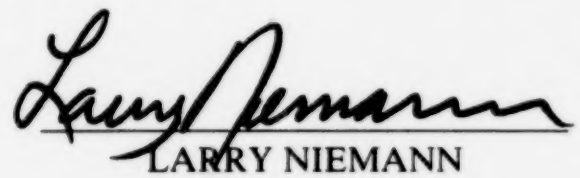
By 
Larry Niemann

Attorneys for Appellant Texas Optometric Association, Inc.

Certificate of Service

I hereby certify that a true and correct copy of this brief has been deposited in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to Robert Q. Keith, attorney for Dr. N. Jay Rogers, 1400 San Jacinto Building, Beaumont, Texas 77701, Brian R. Davis, attorney and W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas

Chapter, 408 First Federal Plaza, 200 E. 10th Street, Austin, Texas 78701, John G. Tucker, attorney for Dr. E Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, Dr. Sal Mora, invidiually, P.O. Box 1751, Beaumont, Texas 77704, Dorothy Prengler, Assistant Attorney General of Texas, attorney for Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, and Dr. Sal Mora, in their official capacity as members of the Texas Optometry Board, Supreme Court Building, P.O. Box 12548, Austin, Texas 78711, and Victor J. Rogers, II, 3434 One Allen Center Houston, Texas 77002, on this 19th day of June, 1978.


LARRY NIEMANN